

**FILED**

MARCH 14, 2007  
**NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
STATE BOARD OF MEDICAL EXAMINERS

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In the Matter of:

BENJAMIN LEVINE, M.D.

FINAL ORDER  
DENYING REINSTATEMENT  
AND CONTINUING SUSPENSION  
OF LICENSE

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This matter was opened before the New Jersey State Board of Medical Examiners (the "Board") upon the Board's receipt of an application by respondent Benjamin Levine, M.D., to reinstate his medical license in the State of New Jersey. In response to that application, a Provisional Order Denying Reinstatement (PODR), with detailed proposed findings of fact and conclusions of law, was filed on October 12, 2006. Therein, the Board preliminarily found basis to deny the application for reinstatement and continue the suspension of licensure then in effect pursuant to N.J.S.A. 45:1-7.1(b) as a result of respondent's failure to renew his license. The PODR stated:

Notwithstanding said suspension, respondent continued to practice medicine in the State of New Jersey, and did so at all times without malpractice insurance, until December 2005. Respondent was arrested on December 8, 2005, and charged in a criminal complaint filed in Middlesex County with engaging in the criminal unlicensed practice of medicine and with having obtained by deception over \$75,000 from the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services and/or Medicare. He has subsequently been

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indicted, in Middlesex County, on charges of Criminal Unlicensed Practice of Medicine, Theft by Deception, Witness Tampering, Tampering with Physical Evidence, and Criminal Sexual Contact.

In addition the PODR, the Board preliminarily found that:

Respondent misrepresented information on an application he completed in July 2006 to seek to obtain a commitment for medical malpractice liability insurance from "Professional Underwriters Liability Insurance Company." It thus appears that respondent failed to disclose thereon (or disclosed, in a misleading manner) the fact that he was under indictment in Middlesex County, and provided incomplete information concerning his prior criminal convictions.

The PODR expressly concluded that "said misconduct constitutes a sufficient predicate to support the entry of an Order denying respondent's request for reinstatement of his medical license, and further continuing the suspension of his medical license in the State of New Jersey." The PODR provided that it was subject to finalization by the Board unless respondent submitted a written request for modification or dismissal, setting forth the reasons why said findings and conclusions should be modified or dismissed, along with any and all documents or other written evidence. He was advised that he would need to request an opportunity to appear and that the Board would determine whether cause exists to hold further proceedings in this matter.

Respondent has submitted no fewer than eight letters to the Board (three after the hearing)<sup>1</sup> , contesting both the procedure followed over the years and conclusions to be drawn from the factual events.<sup>2</sup> In his reply to these assertions, Deputy Attorney General Kevin Jespersen noted that despite the protestations, respondent had not contested the basic underlying facts upon which the PODR had been predicated. The Board determined to schedule a hearing, and with the consent of respondent the matter was presented to a committee of the Board on January 24, 2007.<sup>3</sup> The Attorney General maintained that because there were no issues of material fact in dispute, there was no need for an evidentiary hearing. The Committee agreed that the relevant

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<sup>1</sup> Respondent's letters of October 23, 2006, November 3, 2006, December 13, 2006, December 14, 2007, January 8, 2007, January 25, 2007, January 29, 2007 and February 9, 2007 are all included in the record of this proceeding.

<sup>2</sup> Respondent was advised by the terms of the PODR that "[i]n the event that an evidentiary hearing is ordered, the preliminary findings of fact and conclusions of law contained herein shall serve as notice of the factual and legal allegations made against respondent in such proceeding (that is, in such event, the proposed findings of fact and conclusions of law set forth herein shall be deemed to constitute allegations of an administrative complaint filed against respondent).

<sup>3</sup> The Hearing Committee was chaired by Bassam Haddad M.D. The following Board members also served on the committee: Mario Criscito, M.D., Peter Nussbaum, M.D., Paul Jordan, M.D. and Alvin Strand, M.D.

facts were essentially uncontested<sup>4</sup>, and accordingly, the scope of the proceeding was be focused on the three charges on which it would entertain argument. In fact, the Committee gave Dr. Levine considerable latitude in his presentation, though he was instructed at times to focus his arguments on the charges as set forth in the PODR.

While respondent does not contest the essential underlying facts - that he continued to practice for a period of time when he was not in possession of a "paper license" duly issued by the Board after a renewal, he maintains that the 1991 prior Consent Order entered by the Board in resolution of earlier disciplinary charges gave him a continuing right to practice without meeting current legal prerequisites, such as malpractice coverage. Contrary to respondent's argument the prior Consent Order cannot be viewed as a contract. Nor does it absolve him from meeting all current requirements applicable to licensees. Respondent knew he did not possess a current license issued by the Board - because he knew he had not secured the requisite malpractice insurance. His post hoc rationalization that he considered himself to be validly licensed, notwithstanding the fact that the Board had not issued the "paper license" is simply belied by his actions, and his own statements in correspondence to the

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<sup>4</sup> The Committee formally acknowledged that the exhibits attached to the State's brief are part of the record in this matter, and were relied upon in the disposition of this proceeding.

Board. He knew he needed malpractice insurance to get his license renewed and he knew he was practicing without a valid license for three years.

Nor did the committee find merit in respondent's argument that his failure to have disclosed the fact of two pending indictments on an application for malpractice insurance should be countenanced because he disagreed with these actions and believed he would be vindicated. Malpractice insurers, like hospitals and licensing authorities, have every right and expectation to receive truthful answers on applications. Licensees do not have the option of omitting pertinent and responsive information because it will not be viewed favorably or because they feel they were wrongfully disciplined or charged.

#### **FINDINGS OF FACT**

The Board adopt all of the following findings of fact, exactly as set forth in the PODR, along with an additional findings, as set forth in at #30:

##### **A. Procedural History and Relevant Background**

1. Respondent Benjamin Levine, M.D., was the holder of License No. MA 023897, and was initially licensed to practice medicine in New Jersey on or about June 10, 1970.

2. On or about August 10, 1990, an administrative complaint was filed against respondent. Within the first ten counts of said complaint, the Attorney General alleged that

respondent, once in 1978 and continuing from 1985 through May of 1990, had engaged in acts of sexual contact upon ten female patients by *inter alia* improperly positioning the patients and placing his erect penis in contact with them; by placing his face in contact with their breasts; or otherwise improperly touching them in a manner unrelated to legitimate medical practice. It was further alleged in an eleventh count that respondent provided inappropriate gynecological care to a patient and made a false record entry with respect to that patient. A Supplemental Complaint was filed on September 7, 1990, which included eight additional counts wherein respondent was accused of having engaged in sexual contact of patients during the course of medical examinations occurring from 1986 through July 24, 1990, similar in nature to the initial ten counts of the complaint.

3. Respondent's license to practice medicine and surgery in the State of New Jersey was temporarily suspended on August 17, 1990, following a hearing before the President of the Medical Board. The temporary suspension was continued following a second hearing before the full Board of Medical Examiners on October 10, 1990.

4. On September 30, 1991, a Final Order of the Board was entered pursuant to which the then pending charges against respondent were settled. The Order was entered without admissions being made by respondent, but with respondent's voluntary consent

to the terms of the Order and his waiving of his rights to any further hearings. The Order provided that respondent's medical license was to be suspended for a period of four years, the first 20 months of which were to be an active period of suspension. Respondent was additionally reprimanded for his care and treatment of patient A.C., required to submit to psychiatric and/or psychological evaluations, and assessed investigative costs in the amount of \$20,000. The Board reserved the right to impose conditions on respondent's practice in the event his license were to be reinstated at the conclusion of the period of suspension.

5. Respondent's license to practice medicine and surgery in the State of New Jersey was reinstated pursuant to an Order of Limited Reinstatement filed on August 27, 1992. The Order of Limited Reinstatement provided, among other items, that during all examinations of female patients, respondent was to be accompanied by a chaperone who is either a R.N. or a L.P.N.

6. Respondent maintained an active license with the Board, subject to the continuing requirement that he have a chaperone present during all examinations of female patients, from August 27, 1992 through June 30, 2003.

7. Respondent was found guilty, on or about May 24, 1996, following a criminal trial, of nine counts of violations of N.J.S.A. 2C:14-3(b). Based thereon, respondent was sentenced, on or about July 15, 1996, to 180 days confinement in the Middlesex

County Jail, to be followed by 3 years probation. Monetary assessments were also made.

B. Expiration and Suspension of Licensure in July 2003

8. On or about April 11, 2003, respondent submitted a "Prerenewal Application" form for the biennial licensure period running from July 1, 2003 through June 30, 2005. One portion of said application, entitled "Medical Malpractice Coverage," advised all applicants that "by law you must have medical malpractice insurance (in the amount of at least \$1 million per occurrence and \$3 million per policy year) or a letter of credit (in the amount of \$500,000) unless you are exempt." Respondent revealed (truthfully) that he did not have the required medical malpractice coverage or letter of credit, and did not claim that he was exempt from the malpractice insurance requirement.

9. Respondent was thereafter advised within a telephone call from a Board staff member that the Board would not process his application unless he provided proof that he had secured malpractice insurance, in accordance with the requirements of N.J.S.A. 45:9-17 and N.J.A.C. 13:35-6.18.

10. Respondent attached a handwritten note, dated April 11, 2003, to the Prerenewal Application he submitted to the Board, wherein he acknowledged that he was aware that malpractice insurance was required; specifically, respondent wrote:

Dear Medical Board:



I delayed returning these forms because I could not obtain affordable malpractice insurance after my previous insurer stopped doing business in N.J. and elsewhere.

I desperately need help, as I know liability insurance is required.

Please provide an answer for me. My take pay last year was less than \$2,000. My wife supports me.

11. Respondent failed to complete the remainder of the renewal application for the July 2003 through June 2005 licensure period, and thus never submitted a complete renewal application to the Board. Respondent's license to practice medicine therefore expired on June 30, 2003, and was suspended by operation of N.J.S.A. 45:1-71(b) without a hearing on or about July 30, 2003.

C. Application for Reinstatement of License in 2005 and Arrest and Indictment in Middlesex County

12. On November 17, 2005, respondent completed an application form for the biennial renewal period July 1, 2005 through June 30, 2007. Respondent then sought to apply for a "retired" medical license (a "retired" license is a license issued at a reduced fee to physicians who are over 65 years of age, hold no hospital privileges and are not affiliated with any HMO).

13. Following review of respondent's application (to include review of information submitted by respondent concerning his continuing medical education), respondent was advised in a letter dated December 7, 2005, that the Board was prepared to

reinstate his license, but that the Board would not do so until such time as he provided proof that he had obtained a commitment from a medical malpractice liability insurer to issue him medical malpractice liability insurance (or, in the alternative, secured a letter of credit) as required by N.J.S.A. 45:9-19.17 and N.J.A.C. 13:35-6.18.

14. Respondent was arrested on or about December 8, 2005, based on the filing of a criminal complaint by the Middlesex County Prosecutor's Office charging respondent with having violated N.J.S.A. 2C:20-4 (unlawfully and purposely obtaining by deception over \$75,000 from the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services and/or Medicare) and N.J.S. 2C:21-20 (knowingly engaging in the practice of medicine without possessing a license to practice medicine and/or knowing that his license to practice medicine had been suspended or revoked).

15. Upon receipt of notice of respondent's arrest, a second letter was sent to respondent on December 12, 2005, wherein the previously extended letter of intent to reinstate his license dated December 7, 2005 was rescinded. Respondent was advised in that letter that, in light of his arrest and the pending charges, the Board would not presently grant or deny his application for reinstatement pending further investigation of the facts and circumstances related to the criminal charges that had been filed.

16. On or about April 19, 2006, Indictment No. 06-04-00534 was returned by the Grand Jury in Middlesex County. Therein, respondent was charged with having committed an act of criminal sexual contact with patient T.V., in violation of N.J.S.A. 2C:14-3b (a 4<sup>th</sup> Degree crime).

17. On or about June 16, 2006, Indictment No. 06-06-00882 was returned by the Grand Jury in Middlesex County. Therein, respondent was charged with having engaged in the criminal Unlicensed Practice of Medicine, N.J.S.A. 2C:21-20 (3<sup>rd</sup> Degree); Theft by Deception, N.J.S.A. 2C:20-4 (2<sup>nd</sup> Degree); Witness Tampering, N.J.S.A. 2C:28-5a (3<sup>rd</sup> Degree); and Tampering with Physical Evidence, N.J.S.A. 2C:28-6(1) (4<sup>th</sup> Degree).

18. Respondent forwarded a letter to the Board on June 16, 2006, wherein he proclaimed an intention to "return to the practice of medicine on July 1, 2006." A responsive letter was forwarded from William V. Roeder to respondent on June 23, 2006, wherein respondent was advised and cautioned that he would be engaging in the unlicensed practice of medicine were he to resume any practice of medicine in New Jersey before securing reinstatement of his license from the Board. Mr. Roeder further advised that the Board had not, as of June 23, 2006, sought to further investigate the information received regarding the pending criminal charges in Middlesex County nor scheduled respondent for an investigative hearing before the Board, because he had not yet

presented proof that any malpractice insurer was prepared to issue him a malpractice policy (were his license to be reinstated) and/or proof that he was prepared to post a letter of credit. Finally, respondent was advised that were he to submit such proof, he would then be scheduled to appear before a Committee of the Board for an investigative hearing related to his application for reinstatement, and that the Board would not decide whether to grant or deny reinstatement of licensure until such time.

D. Malpractice Insurance

19. On or about March 20, 1998, L. 1998, c. 365, codified at N.J.S.A. 45:9-19.17, became effective. The law provided that any physician who maintains a professional medical practice in New Jersey and has responsibility for patient care is required to be covered by medical malpractice liability insurance or, if such liability insurance is not available, by a letter of credit for at least \$500,000.

20. Respondent last held medical malpractice insurance under a policy issued by the Pennsylvania Medical Society Liability Insurance Corporation ("PMSLIC"). Respondent was insured through PMSLIC under Policy # NO0000123, which policy had an effective date of December 30, 1999. Respondent's malpractice insurance policy expired on or about December 30, 2002.

21. Prior to the expiration of PMSLIC Policy #NO0000123, respondent was advised by way of letter dated July 24, 2002 that

PMSLIC had decided to discontinue offering insurance to New Jersey physicians, and was then specifically advised that his PMSLIC policy would be non-renewed on December 30, 2002.

22. Respondent did not secure any medical malpractice insurance from any carrier after his PMSLIC policy expired on or about December 30, 2002.

23. Respondent continued to practice medicine after December 30, 2002 without holding medical malpractice liability insurance and/or without having posted a letter of credit. All practice of medicine by respondent subsequent to December 30, 2002 (to include practice both before and after the expiration and suspension of his license) was conducted without medical malpractice liability insurance.

24. By way of letter dated August 7, 2006, respondent wrote to the Board and advised that he had located a high-risk malpractice insurer which was willing to issue him a malpractice policy. Respondent provided the Board with a copy of a letter dated August 3, 2006 he had received from Craig Skerpac (Vice President of the Joseph A. Britton Agency), wherein two offers (one with a "tail" and one without) for professional medical malpractice liability insurance through the Professional Underwriters Liability Insurance Company ("PULIC") were outlined.

25. Following the Board's receipt of respondent's August 7, 2006 letter, respondent was scheduled to appear before a Committee of the Board on September 6, 2006.

26. On or about July 24, 2006, respondent submitted an application for professional malpractice insurance with PULIC, through the Joseph A. Britton Agency, Inc., 855 Mountain Avenue, Mountainside, New Jersey 07092. Said application included the following question: "Have you ever been convicted of, or are you under indictment for, a felony?" The application instructed that "if the answer ... is yes, please give full details (including dates) on a separate sheet of paper." Respondent answered "yes" to said question, but the only explanation he provided was "convicted of patient complaints after 2 trials in 1996 -- under appeal." Respondent thus did not disclose the fact that he was then under indictment in Middlesex County, nor did he provide an appropriately detailed statement regarding the crimes of which he had been convicted.

27. Respondent signed a certification on the application form submitted to PULIC where he stated "I do hereby warrant the truth of all statements and answers herein, and that I have not withheld any information which may influence or would influence the judgment of the Company in considering this application for professional liability insurance." The form was signed and dated July 24, 2006.

E. Appearance before Committee of the Board

28. Respondent appeared before a Committee of the Board on September 6, 2006, and then testified under oath in connection with his application for reinstatement.

29. Respondent admitted under oath that he practiced medicine between July 1, 2003 and sometime in December 2005, from an office at 3 Cornwall Drive, East Brunswick, New Jersey. Respondent testified that he held no hospital privileges during that time period and that he was on call at all times ("24 hours a day, seven days a week") to handle emergencies. Respondent further testified that he wrote prescriptions for patients, to include prescriptions for controlled dangerous substances, during said time period.

30. Respondent admitted under oath that after PMSLIC discontinued his medical malpractice insurance, he did not obtain any replacement coverage. By his own admission, respondent Levine was without medical malpractice insurance for the period of at least December 2002, through December 2005 during which time he was engaged in the active practice of medicine.

**CONCLUSIONS OF LAW**

The Boards adopt all of the following conclusion of law, as set forth in the PODR, along with additional conclusions, responding to the arguments raised at paragraphs #5 through #9 below:

1. Unlicensed Practice of Medicine -- Respondent Benjamin Levine, M.D. engaged in the unlicensed practice of medicine in the State of New Jersey, at all times in which he engaged in medical practice on or after July 1, 2003, as his license to practice medicine expired on June 30, 2003 and was suspended pursuant to N.J.S.A. 45:1-7.1(b) on July 30, 2003. See N.J.S.A. 45:1-7.1(c). Respondent's conduct constitutes grounds upon which the Board may refuse to reinstate respondent's license, and/or order the suspension or revocation of said license, pursuant to N.J.S.A. 45:1-21 (e) and (h).

2. Practice of Medicine without Mandatory Medical Malpractice Liability Insurance Coverage -- Respondent Benjamin Levine, M.D., engaged in medical practice without holding medical malpractice insurance or, in the alternative, maintaining a letter of credit, as required by N.J.S.A. 45:9-19.17 and N.J.A.C. 13:35-6.18 at all times after December 2002. Respondent's conduct directly violated the requirements of N.J.S.A. 45:9-19.17 and N.J.A.C. 13:35-6.18, and constituted professional misconduct within the meaning of N.J.S.A. 45:1-21(e), pursuant to N.J.A.C. 13:35-6.18(e). Respondent's conduct constitutes grounds upon which the Board may refuse to reinstate respondent's license, and/or order the suspension or revocation of said license, pursuant to N.J.S.A. 45:1-21 (e) and (h).



3. Engaging in the Use or Employment of Dishonesty, Fraud, Deception, Misrepresentation, False Promise or False Pretense -- Respondent engaged in the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense, when he submitted an application for malpractice insurance with PULIC through the Britton Agency, as he failed to reveal thereon the fact that he was then presently indicted in Middlesex County, notwithstanding that he was directly asked whether he was then under indictment for any felony, and as he failed to provide sufficient detail thereon concerning his prior criminal convictions. Respondent's conduct constitutes grounds upon which the Board may refuse to reinstate respondent's license, and/or order the suspension or revocation of said license, pursuant to N.J.S.A. 45:1-21 (b).

4. All of the above violations of law, independently and/or in combination, constitute bases upon which the reinstatement of respondent's medical license may be denied, pursuant to N.J.S.A. 45:1-21 (b), (e) and/or (h). The Board preliminarily concludes that an adequate and compelling predicate exists in this matter upon which to Order the denial of respondent's request for reinstatement of license and to further Order the continued suspension of his medical license.

5. Contrary to respondent's position as set forth in the his response to the PODR, the malpractice insurance requirements of

N.J.S.A. 45:9-19.17 and N.J.A.C. 13:35-6.18 are constitutionally sound and fully enforceable. They are not arbitrary or discriminatory and are rationally related to a legitimate governmental purpose - as noted in the legislation, to "ensure the citizens of the State that they will have some recourse for adequate compensation in the event that a physician . . . is found responsible for acts of malpractice." Nor does N.J.S.A. 45:9-19.17 affect a fundamental right or create a suspect classification. Moreover, the mandate of N.J.S.A. 45:9-19.17 is consistent with the New Jersey Constitution's equal protection and substantive due process requirements.

6. The 1991 Consent Order is not a contract that entitles respondent to be deemed exempt from any statutory licensing requirement. Nor can the Consent Order be read to grant Dr. Levine an inviolate right to practice medicine indefinitely. The Committee expressly rejects respondent's argument that he has been granted "the right to practice medicine for life" or that the "renewal is automatic" if he "completes the application and pays the fee." The Order did not even make his reinstatement automatic, as the Board expressly preserved its right to impose conditions on licensure, over and above those imposed by the statute and regulations.

7. The Board lacks the authority to waive the malpractice insurance requirement, and that it became aware of the

lapse and did not move to enforce immediately cannot and should not be deemed to have authorized respondent's continued practice. The Board is in no way foreclosed from enforcing the statute presently.

8. That respondent has asserted defenses to the pending indictments, in no way afforded him a right to decline to disclose their existence in response to a direct question on the malpractice insurance application.

9. Despite his protestations and complaints, this proceeding does not afford respondent any opportunity to litigate any of his grievances concerning the process that lead to the 1991 Consent Order.

ACCORDINGLY, it is on this 14 th day of March, 2007, ORDERED:

1. Respondent's application to reinstate his medical license in the State of New Jersey is hereby denied.

2. Respondent's license is and shall continue to be suspended in the State of New Jersey, until such time as further Order of the Board may be entered in this matter.

3. Respondent may not seek leave to reapply for reinstatement for a period of two years from the date of entry of the original PODR, and should he determine to seek reapplication at that time he may be required to appear before a committee of the Board, and demonstrate that he has taken, or has a plan to take the continuing medical education required for reinstatement, that he has medical malpractice insurance available to him before he resumes practice,

that he has satisfied all outstanding debts owed to the Board, as well as any other conditions as the Board may at that time deem appropriate. The Board reserves the right to then condition any reinstatement upon such terms, restrictions or conditions (to include, without limitation, a chaperone requirement) that the Board then deems reasonable and necessary.

NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

BY: Sindy Paul MD

Sindy Paul, M.D.  
Board President